Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

Market forces, not regulations, should drive the deployment of advanced telecommunications networks and services. The Commission must exercise the independent forbearance authority established in Section 706 to ensure that incentives are created for infrastructure investment buy ILECs in advanced telecommunications networks and services. Regulatory parity, relief from Section 251 collocation, unbundling and resale requirements, costly and burdensome separate subsidiary requirements and LATA boundary restrictions, are fundamental to ILECs competing on a level playing field with competitors providing high-speed data and Internet services. The public interest benefits of increased bandwidth capacity, more customer and end user choices, lower prices, and technological innovation can only be realized through market driven competition.

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INTRODUCTION

The United States Telephone Association ("USTA") hereby files its Comments in response to the Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ("MOO" & "NPRM"), released August 7, 1998, regarding deployment of advanced telecommunications networks and services. USTA is the principal trade association of the incumbent local exchange carrier industry ("ILECs").

The market for high-speed, advanced data and Internet services is extremely competitive.[1] Public demand for increased bandwidth capacity continues to outstrip supply. According to one observer, "In a competitive market, companies must constantly invest and innovate, or risk losing

[1] *See, e.g.*, USTA August 12, 1998 *Ex parte* filing Crandall & Jackson, *Eliminating Barriers to DSL Service*, July 1998.

out to competitors."[2] ILECs are faced with providing advanced telecommunications networks pursuant to burdensome and costly regulations not applicable to competitors.[3] The incentives necessary for ILECs to invest and deploy advanced telecommunications services envisioned by Section 706 of the Telecommunications Act of 1996 ("Act") and the pro-competitive, deregulatory intent of the Act are reduced.

USTA urges the Commission to eliminate, not construct, barriers to ILECs fully participating on a competitively neutral basis in meeting the public's demand for high-speed data and Internet services. Out-dated telephony regulations that were never intended for a packet-switched, digitized data and Internet world designed to facilitate the convergence of voice, video, and information technologies, should not be adopted by the Commission and then solely applied to ILECs. Such regulations stifle innovation, are disincentives to investments by ILECs in advanced telecommunications networks and services, are anti-competitive and discriminatory applied to ILECs, and are inconsistent with the public interest benefits of market-based competition leading to greater customer and end user choices and lower prices. Market forces, not government regulations, should be the economic driver for data and Internet competition.

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[2] *See* Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series No. 29 at 7 dated March 1997

[3] *See also*, Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Woking Paper Series No. 30, dated August 1998

I. REGULATORY PARITY MUST BE IMPLEMENTED

Micro-management by the Commission of data and Internet markets will not facilitate the response to the public's demand for such services. Real competition between different industries to provide such services can only occur when the Commission's regulations are competitively neutral. USTA supports the elimination of regulations that place ILECs at a competitive disadvantage to competitors like MCI/WorldCom's UUNET, QWEST, Level 3 and cable providers of high-speed data and Internet services such as TimeWarner's "RoadRunner," and TCI's @Home Internet access services. If the public interest is to be served by increased competition, lower prices, greater choices, and access to innovative, advanced telecommunications networks and services, then the Commission must use its independent forbearance authority under Section 706 of the Act, and similar authority under Section 10[4] of the Act, to forbear from imposing burdensome, costly and unnecessary regulations on ILECs, while concurrently using its biennial review authority pursuant to Section 11[5] of the Act to implement regulatory reforms by eliminate unnecessary regulations.

USTA supports the arguments raised in Petitions filed by SBC and Bell Atlantic that Section 706 provides clear, separate and independent grounds for regulatory forbearance. As SBC argues:

> Section 706 imposes on the Commission an obligation to promote the deployment of advanced telecommunications services to all

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[4] 47 U.S.C. §160

[5] 47 U.S.C. §161

> Americans, an obligation that is plainly distinct from section 10's mandate that the FCC forbear from enforcing regulation that is no longer necessary to protect consumers.[6]

Similarly, Bell Atlantic correctly states that "section 706 gives the Commission an affirmative obligation to encourage the deployment of advanced telecommunications by utilizing ... "regulatory forbearance..." when doing so will promote competition and the deployment of advanced services."[7]

II. SEPARATE SUBSIDIARY REQUIREMENTS ARE BURDENSOME AND COSTLY

Separate subsidiaries are unnecessary, costly, and burdensome duplications of parent company operations for all ILECs, especially small, and mid-size companies. Creation of separate subsidiaries and supporting systems can only delay the deployment of advanced telecommunications networks and services. Cable companies and other competitors are not required to establish separate subsidiaries to provide high-speed data and Internet services. The pro-competitive, deregulatory, intent of the Act will be furthered when regulatory parity becomes the Commission's public policy goal. By removing artificial barriers to competition such as the separate subsidiary requirements for ILECs, the Commission will provide incentives for ILEC's to rapidly deploy innovative, advanced telecommunications networks and services. Otherwise, the Commission's proposals will continue to place ILECs at a competitive disadvantage, make

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[6] *SBC, Pac Bell and Nevada Bell Petition for Reconsideration* at 5-9, September 8, 1998.

[7] *Bell Atlantic Petition for Partial Reconsideration, or Alternatively for Clarification* at 6, September 8, 1998.

ILEC infrastructure investments riskier, and delay the public's access to high-speed data and Internet services at market-driven prices.

III. COLLOCATION REQUIREMENTS PREEMPT STATE REGULATION

A potential consequence of the Commission's collocation requirements[8] for ILECs deploying advance telecommunications networks is preemption of existing state approved collocation agreements. The Commission's ILEC collocation requirements create another layer of burdensome and costly regulations. The collocation rules adopted in the Commission's *Local Competition Order* are sufficient to address any issues which may arise regarding access by competitors to ILEC facilities through collocation arrangements.[9]

IV. UNBUNDLING REQUIREMENTS SHOULD NOT APPLY

The Commission's imposition of unbundling and resale obligations on ILECs when deploying advanced telecommunications networks and services also raises the issue of Commission preemption of state commission decisions. Moreover, the Commission's decision creates further inequities for ILECs because the unbundling requirement only applies to ILECs and not other competitors, when ILECs deploy high-speed data and Internet services in these

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[8] *Memorandum Opinion and Order and Notice of Proposed Rulemaking* at 30-32, ¶¶62-64, 53-67,¶¶118-150 (discussion of specific additional collocation requirements beyond those required under the *Local Competition Order*).

[9] 11 FCC Rcd at 15782-15809, ¶¶555-612.

competitive markets. These unbundling requirements act as disincentives to infrastructure investments by ILECs in advanced telecommunications networks and services.

USTA opposes the requirement that ILECs must condition local loops for competitors. The Commission is prohibited from mandating that ILECs provide conditioned loops at the request of competitors superior in quality to what the incumbent provides itself.[10] As the Eighth Circuit Court of Appeals reasoned, nondiscriminatory access to network elements on an unbundled basis pursuant to Section 251(c)(3) of the Act

> does not mandate that requesting carriers receive superior quality access to network elements upon demand.... The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier.[11]

USTA supports the Petitions for Reconsideration filed by Bell Atlantic and SBC to eliminate the Commission's mandatory loop conditioning requirement.[12] As GTE explains in supporting comments:

> To the extent the Commission's ... determinations may be read to require non-voluntary loop conditioning in geographic areas in

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[10] *Iowa Utilities Board v. FCC*, 120 F.3rd 753, 812-813 (8th Cir. 1997), *cert granted* 118 S.Ct. 879 (1998).

[11] *Id.*

[12] *Bell Atlantic Petition for Partial Reconsideration, or Alternatively for Clarification* at 2-5, September 8, 1998; *SBC, Pac Bell and Nevada Bell Petition for Reconsideration* at 2-5, September 8, 1998.

> which an ILEC does not provide such conditioning for itself or its affiliates, it is in direct contravention of *Iowa Utilities Board* and may not stand.[13]

V. RESALE OBLIGATIONS IMPOSED UPON ILECS ARE INCONSISTENT WITH PRIOR COMMISSION POLICY

Regarding resale of advanced telecommunications services the Commission has concluded:

> By its terms, section 251(c)(4) applies to "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Advanced services generally offered by incumbent LEC's to subscribers who are not telecommunications carriers meet this statutory test. We thus tentatively conclude that these services fall within the core category of retail services that both Congress and the Commission deemed subject to the resale obligation, and the reasoning that lead the Commission in the *Local Competition Order* to exclude exchange access from the section 251(c)(4) resale obligation does not apply. We tentatively conclude, therefore, that advanced services marketed by incumbent LEC's generally to residential or business users or to Internet service providers should be subject to section 251(c)(4) resale obligation, without regard to their classification as telephone exchange service or exchange access.[14]

ILECs are handicapped in their ability to compete on a regulatory neutral playing field because of the Commission's inexplicable reluctancy to affirmatively exercise the independent forbearance authority under Section 706, as intended by the Act, by not imposing

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[13] *GTE Comments* at 3, CC Docket No. 98-147, September 23, 1998 (comments in support of Petitions for Reconsideration filed by Bell Atlantic and SBC).

[14] *Memorandum Opinion and Order and Notice of Proposed Rulemaking* at 83, ¶189.

burdensome and costly Section 251 regulations and separate subsidiary requirements. The Commission proposes to ignore its own *Local Competition Order* on the resale of access services, and impose a subset of regulations on ILECs who provide access services through advanced telecommunications networks. Based upon the Commission's proposal, ILEC access services provided over their wireline networks would not be subject to the resale obligations of Section 251(c)(4), while access services provided by ILECs over advanced telecommunications networks would be subject to the resale obligations of Section 251(c)(4).

USTA opposes applying Section 251(c)(4) resale obligations on ILEC deployed advanced telecommunications networks and services. Classifying all advanced telecommunications services deployed by ILECs as telecommunications services in which resale obligations apply is inconsistent with the Commission's *Local Competition Order* that exchange access is not subject to the resale obligations of Section 251(c)(4) and the Commission's *Universal Service Report to Congress*.

The Commission has failed to provide any reasoning why exchange access must now be subject to is Section 251(c)(4) resale obligations when made available through ILEC deployed advanced telecommunications networks and service offerings. In the *Local Competition Order*, the Commission concluded that exchange access service does not fit within the definition of services that ILECs are required to offer for resale under Section 251(c)(4):

> Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users.... [W]e conclude that the language and intent of Section 251 clearly demonstrates that exchange access services should not be

considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4).

We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users. Part 69 of our rules defines these charges as "carrier's carrier charges," and the specific part 69 rules that describe each interstate switched access element refer to charges assessed on "interexchange carriers" rather than end users.... Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any "retail" costs when offering these services targeted to end user subscribers because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate. Furthermore, ... section 251(c)(4) does not entitle subscribers to obtain services at wholesale rates for their own use. Permitting IXCs to purchase access services at wholesale rates for their own use would be inconsistent with this requirement.

We conclude that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers, not with end users or other entities.[15]

The Commission's reasons for not including exchange access as an ILEC resale obligation under Section 251(c)(4) are just as compelling when applied to ILEC deployed advanced telecommunications networks and services. Moreover, imposition of resale

[15] 11 FCC Rcd at 15934-15936, ¶¶875-877-878.

obligations on ILECs serves as a disincentive, is discriminatory, anti-competitive, and contrary to Section 706 requirement that the Commission remove barriers to infrastructure investments. The added regulatory burdens and costs of ILECs creating separate subsidiaries to provide advanced telecommunications networks and services are simply unnecessary in competitive markets such as the data and Internet markets. Also, any advantage of being first-to- market innovative services is lost. The Chairman has recognized the importance of ILECs also benefitting from innovations which lead to first-to-market advantages. As the Chairman stated:

> I, for one, am not afraid of seeing wireline telephone providers have a first mover advantage -- if you make the investments to get to market first ....[16]

In its *Universal Service Report to Congress*, the Commission concluded that "Internet access providers do not offer "telecommunications service" when they furnish Internet access to their customers ...."[17] The Commission reasoned that

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information

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[16] *Id.*

[17] *Universal Service Report to Congress* at 42, ¶83, CC Docket No. 96-45, FCC 98-67, released April 10, 1998.

service."[18]

> In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service. Since 1980, we have classed such entities as enhanced service providers. We conclude that, under the Act, they are appropriately classed as information service providers.[19]

The Commission classifies xDSL services as telecommunications services, while Internet access services are classified as information services. According to the Commission:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, xDSL enabled transmission path), and the second service is an information service, in this case Internet access.[20]

What is clear from the Commission's MOO and NPRM is that the Commission's reading of the resale obligations of ILECs under Section 251(c)(4) is at best inconsistent with the *Local Competition Order and its Universal Service Report to Congress*, and at worst undermines the intent and purpose of the Act. USTA urges the Commission to forbear from applying Section 251(c)(4) obligations on ILEC deployed advanced telecommunications networks and services.

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[18] *Id.* at 41, ¶80.

[19] *Id.* at 41, ¶81.

[20] *Id.* at 20, ¶36.

VI. LATA BOUNDARY RESTRICTIONS ARE UNWORKABLE IN TODAY'S MARKETPLACE

USTA supports removal of LATA boundary restrictions. Such artificial distinctions were created fifteen years ago for the circuit-switched voice network of 1983. In today's packet-switched data and Internet world, LATA boundary restrictions are useless where neither the consumer nor telephone company may know to what path information packets may take in arriving at their final destinations.[21] In addition, the investment required to deploy advanced telecommunications networks and services are substantial. LATA boundary restrictions act as disincentives to make the infrastructure investments necessary to meet the public's demand for greater bandwidth capacity. Moreover, the market for data and Internet services are fully competitive. RBOCs are not dominant. RBOCs lack the same alleged anti-competitive potential or unfair or special advantages entering the data and Internet markets as the Commission has thought applies to RBOC local exchange carrier markets and their access to in-region long distance markets.

By lifting the LATA boundary restrictions, RBOC's will be able to compete on a regulatory neutral playing field with competitors like TimeWarner's "Road Runner," TCI's @Home, MCI/WorldCom's UUNET, Level 3, QWEST and other providers of data and Internet

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[21] *USTA Comments* at 3-6, September 18, 1998. *In the Matter of GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, *In the Matter of Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986*, CC Docket No. 98-103, *In the Matter of BellSouth Telecommunications, Inc., BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476*, CC Docket No. 98-161.

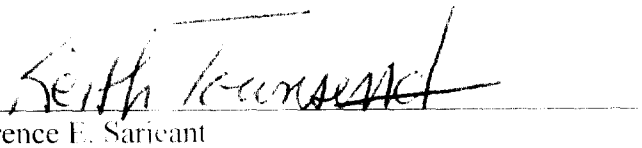
access who are unencumbered by LATA boundary restrictions. The end result of removing barriers to ILECs gaining regulatory parity with competitors is that the public interest will be served by greater ILEC infrastructure investments, rapid deployment of advanced telecommunications networks and services, innovation, less network congestion, more customer and end user choices, and lower prices. These benefits of market-driven competition cannot be replicated by the Commission's retention of LATA boundary restriction.

CONCLUSION

The Commission must exercise the regulatory forbearance intended by Section 706 of the Act. Separate subsidiary, collocation, unbundling, resale and LATA boundary restrictions imposed upon ILECs are discriminatory, anti-competitive, protectionist, contrary to the pro-competitive, deregulatory intent of the Act, and not in the public interest. True exploitation of the Internet can only occur when competition is unleashed, not constrained by regulations that have no modern day use. Public demand for access to high-speed, data and Internet networks and services can only be met if ILECs are permitted the same unfettered opportunity to compete as its competitors now enjoy.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION



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